Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1978

No. ___ 78-522

CHARLES WENTZ and V.I.P. ELECTRIC, Inc.,
PETITIONERS,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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CITATIONS

Cases:

Accord Local P575 Amalgamated Meat Cutters (Iowa Beef Packers, Inc.) 188 NLRB 5 (1971) 7

International Bhd. of Electrical Workers, et al., and Franklin Electric Construction and Utilities 121 NLRB 143 (1958) 7

United Mine Workers v. Coronado Coal Co. 259 U.S. 344 (1922) 6, 7, 8, 9

Miscellaneous:

U.S. Department of Labor-Bureau of Labor Statistics (1977), Directory of National Unions and Employee Associations, 1975, Bulletin 1937 7

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Charles.Wentz and V.I.P. Electric, Inc., (Party-Plaintiff by reason of subrogation pursuant to Nebraska Workmen's Compensation), respectfully pray that a writ of certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on June 29, 1978.

OPINION BELOW

The opinion of the District Court for the District of Nebraska was never rendered in published form. The District Court overruled respondents' motion to dismiss but sustained respondents' motion for summary judgment and to dismiss petitioners' amended complaint as to the International Brotherhood of Electrical Workers. The Eighth Circuit affirmed the District Court's opinion. The opinion of the Eighth Circuit appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was filed on June 29, 1978. This petition for certiorari was filed within 90 days of that date which would be September 27, 1978. This Court's jurisdiction is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Can the International Brotherhood of Electrical Workers delegate to another its jurisdiction over all electrical workers, and escape liability when the designee acts arbitrarily, discriminatorily or in bad faith?

2. Is the local union, to-wit, Local 1525 IBEW, an agent of the International/Parent union?

3. Are arbitrary, discriminatory, or bad faith actions on the part of a labor union a basis for liability when the result of such conduct is to fail to enforce certain provisions of the collective bargaining agreement?

4. Must the International affirm conduct of the local union to be liable for the local's activities or are they liable for misfeasance and nonfeasance of the agent?

STATUTORY PROVISIONS INVOLVED

UNITED STATES CODE, TITLE 29

Section 159(a) Exclusive representatives—Employee's Adjustment of Grievances Directly with Employer.

> Representatives designated or selected for the purpose of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such a unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, that any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, that the bargaining representative has been given opportunity to be present at such adjustment.

HOW FEDERAL QUESTION IS PRESENTED

The jurisdiction of the District Court was invoked because a federal question arises under 29 U.S.C. Sec. 159(a), the National Labor Relations Act.

STATEMENT OF THE CASE

Charles Wentz has been a journeyman-lineman and member of Local Union 1525 IBEW since August, 1969. (R.38) Wentz had been sent from the hall by the steward to work on the City of Lincoln transmission lines for V.I.P. Electric, Inc., about three weeks before the day of the accident, February 28, 1972. Wentz was then 29 years old and working as a foreman. (R.41) Lynn Landholm and Dennis Clark worked with him and were present when the accident occurred. (R.42)

The 13,000 volt electric transmission lines were reached by utilizing an Elliott High Rise, which is a bucket on the end of a hydraulic crane. A defective hydraulic system caused the bucket to drop or shift position, which, in turn, caused Charles Wentz to lose his balance and threw him into the transmission lines (R.43) resulting in horrendous injuries. (R.87,88)

About ten minutes before the accident, Callahan, the business agent for Local 1525, was at the job site. (R.50) Wentz complained then as he had on other occasions about the unsafe working conditions surrounding use of the hydraulic system and the truck. (R.58) Besides the hydraulic leak, the levelers on the truck did not work, the outriggers continually allowed the boom to sway from side to side, and twice Wentz had to run the truck without brakes. (R.59)

Callahan, the business agent, told Wentz to do things the way V.I.P. wanted them done—not the way the contract required. Callahan said V.I.P. was a "new contractor" and the union should "give him every break it could." (R.66) The union needed all the new contractors it could get and it should bend over backwards to care for and accommodate the contractor. (R.88) This meant that Wentz must work under these conditions or there would be no job. (R.89)

Clark, another union member, testified that the standard rumor at the job was that unsafe equipment continued to be used because Sanks and V.I.P. was a new contractor, that V.I.P. was union and Local 1525 wanted to keep him union. (R.141)

Landholm, another union employee, was also aware that complaints had been made to V.I.P. about the hydraulic system and saw Callahan on the job site that day. (R.151)

Henry M. Conover, 1221 Massachusetts Avenue, N.W., Washington, DC, was employed by the International Brotherhood of Electrical Workers as Assistant to the President, having held that position for six years immediately preceding the time of deposition. (R.93) He related Congress delegated to the International the power to represent the laboring man. The International is the parent body which charters the local union

and gives it autonomy to act within a certain area. (R.102) One of the International's functions is to see that the local operates within the authority granted by the International. (R.103) All authority of the local union originates from the International Constitution. (R.106)

Of the exhibits which apply to safety considerations, none is so direct as the Constitution of the International Brotherhood of Electrical Workers as amended at the 29th Convention, Seattle, Washington, September, 1970. (Pl. Ex. 3; R.27,101)

Special attention should be given to Article I, Section I, wherein it states that the IBEW exercises "jurisdiction over all electrical workers." The Constitution specifically delineates the extensive authority of the International over the local unions, for example:

A. To set up territorial limits of local unions.

B. To designate minimum and maximum numbers of local unions.

C. The International is to approve all officers, by-laws, and amendments thereto before they become effective as to the local union.

D. No contract is of any force and effect until approved by the International President.

E. To suspend any officer or any local union which in the opinion of the International is not doing its job.

F. To take charge of the affairs of any local union.

G. To receive monies and *to designate the amount of money to be received from each local union*.

H. To specify even the hours that a local union may hold meetings.

I. To set up the standards of safety which the local union shall follow.

J. To make investigations of accidents.

K. In the event a local union is sued, to provide legal assistance at the expense of the international Brotherhood of Electrical Workers.

According to Conover, it is the responsibility (duty) of the union's business agent to see that the safety provisions of the contract are enforced. (R.120) An International representative would deal in negotiations with local contractors as to safety rules and regulations in a contract when requested to do so by the local union. (R.144) A guide to safety was written by the Safety Department of the International, of which Conover was in charge, and given to all local unions. (R.94) I.B.E.W., Safety Guide for Local Unions, issued by International Brotherhood of Electrical Workers Safety Department. (Pl. Ex. 1; R.27,101) Safety is part of the working conditions which are subject to negotiation. Refusal to negotiate working conditions is a violation of law. (R.98)

REASONS FOR GRANTING THE WRIT

1. Special and important fact and policy considerations concerning worker compensation for injury necessitates the Court's review of agency principles relating to the International.

The significance of this case goes far beyond the merits of the issues; specifically, can the powerful I.B.E.W. escape liability for arbitrary and discriminatory conduct to its members by passing the buck to an insolvent local union? Does the 1922 case of *United Mine Workers v. Coronodo Coal Co.*, 259 U.S. 344 (1922) still apply, that before a parent union can be found liable for the local's action it must affirm that action, or do the ordinary rules of principal servant-agency apply? Counsel acknowledges circuit court authority originating from this Court's holding in *United Mine Workers v. Coronodo Coal Co.*, *supra*, that without affirmance by the international unions, they are not liable for actions of individual members. We strongly assert that the time has come to review this doctrine, announced 55 years ago, when unions were in their infancy and their survival strength was tentative.

Today, unions have matured to a position of unparalleled power which they do not hesitate to exercise. If the Eighth Circuit opinion stands, the worker who is victim of arbitrary and discriminatory union conduct is denied his rightful opportunity to recover compensation. We speak of social responsibility. We stress to the Court that such a decision directly and immediately affects 20 million union members, 22% of the total U.S. labor force,[1] and establishes that unions no longer need be responsive and viable to the ideals and people they were created to protect. To reaffirm the *United Mine Workers*, *supra*, serves not only to reward unions financially for irresponsible conduct, but more particularly to destroy the future lives of many.

This case *sub judice* is not one in which a plaintiff seeks to impose liability on a union which merely included a general safety provision in a collective bargaining agreement. Rather, the defendant International unilaterally instituted, under its own constitution, a highly comprehensive safety provision review and enforcement procedure and maintained close control over the local.

There has been inconsistent and confusing reasoning used to reach decisions in cases involving internationals. That the courts no longer appear so certain that agency is not present indicates they are looking to the big picture rather than strictly to precedent. While the International was not held liable, there is appropriate language in *International Bhd. of Electrical Workers et al., and Franklin Electric Construction and Utilities*, 121 NLRB 143 (1958):

> "If the respondent local is not merely an administrative arm of its international, the latter's responsibility for any specific conduct to the former must be determined by the ordinary rules of agency." (*Id.* at 148)

This principle was also recognized in *Accord Local P575 Amalgamated Meat Cutters (Iowa Beef Packers, Inc.)*, 188 NLRB 5 (1971). While the facts do differ, this Court even stated in *United Mine Workers v. Coronado Coal Co.*, *supra*, that agency

1. From U.S. Department of Labor-Bureau of Labor Statistics (1977), Directory of National Unions and Employee Associations, 1975, Bulletin 1937.

law does apply: "It is a mere question of actual agency . . ." *Id.* at 395.

Coronado Coal, *supra*, must be distinguished from the instant case. In *Coronado*, the locals were authorized to conduct local strikes completely independent from the International. An act of ratification was necessary to involve the International but none was found. Here, however, by Article I, Section 1, of the IBEW Constitution, (Pl. Ex. 3; R.27,101), it is seen the International exercises "jurisdiction over all electrical workers." Article XVII, Section 7, goes further:

> "All bylaws, amendments and rules, all *agreements*, jurisdiction, etc., *of any kind or nature shall be submitted . . . to the I.P.* (International President) *for approval. . . .* No L.U. (Local Union) shall put into effect *any* bylaw, amendment, rule, or *agreement* of any kind without first securing such approval. *All these shall be null and void without I.P. approval.*" (Emphasis added.)

The contract (Pl. Ex. 4; R.33,101) "Agreement Effective on all Outside Electrical Work Within the Jurisdiction of the Local Union #1525", executed by defendant, Local 1525, shows approval by the International office on November 19, 1973. Clearly exhibited in these documents is a downward flow of authorization from the International to the Local.

Any collective bargaining agreement or contract between V.I.P. and Local 1525 must have been approved by the International President or be declared null and void according to the International Constitution. Claiming the local is the exclusive bargaining agent for the workers is legal fiction because the International must approve everything the local does. Then isn't arbitrary enforcement, i.e. rich contractor, safe equipment; new or poor contractor, unsafe equipment, discrimination by the International? Why then is the International given the special privilege that it is liable only if it takes affirmative action as to the local's conduct?

International President Charles H. Pillard, in a letter to all construction locals on September 25, 1973, (Pl. Ex. 6; R.36)

pointed out that the policy of the U.S. Government, through the U.S. Department of Labor, has been to pursue actively a course of conduct to reverse an industry trend in which 23% of the construction workers suffer job-related injuries or illnesses, the "highest of all industries." He went on to state:

> "This shameful condition must be eliminated and we must share in the responsibilities of reversing this trend by doing our part in negotiating adequate protection for IBEW members."

He then mandated that in future agreements, all locals include provisions for more stringent safe working practices.

How can the International now deny direct involvement when it is required by its constitution and it has actively sought involvement? What body other than the International is in a better position to make local agents, such as Callahan, accept their responsibility? More important, who will ever be responsible for safety in this dangerous industry if the "Callahans" in other locals refuse to act? If the International is liable only by affirming the conduct of the Local then it will never be responsible. Who is ultimately to bear the responsibility to the worker? When the local business agent fails and the International denies any responsibility, the helpless, injured worker has no redress. His plight is even more onerous if the courts also refuse to uphold the federal policy of protection for the worker which is the very foundation of the National Labor Relations Act.

The Eighth Circuit is too conclusionary in its opinion. Certainly Wentz did not complain to the International officials. It would be unreasonable to require this considering the short time he was on the job. Nonetheless, notice to an agent (Callahan) may be imputed to the principal (International), absent adverse conduct. (We recognize that the Court is familiar with the basic law of agency.) It was the arbitrary and discriminatory conduct of Local 1525 that allowed V.I.P. to breach its contract.

The Eighth Circuit cannot rely on *Coronado*, *supra*, when the fact of autonomous local control therein clearly distinguishes it from the IBEW in the instant case. Neither can it say the International is not a party to the collective bargaining contract when International approval is required. The Court should not allow *stare decisis* to strangle, ultimately destroying important individual rights where the rationale behind the rule of law has disappeared.

CONCLUSION

For these reasons, Petitioner prays the Court issue a writ of certiorari to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of September, 1978, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to David D. Weinberg, Weinberg & Weinberg, P.C., 300 Keeline Building, Omaha, Nebraska, 68102, Counsel for the Respondent. I further certify that all parties required to be served have been served.

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United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 78-1029

CHARLES WENTZ AND V.I.P. ELECTRIC, INC.,
APPELLANTS,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEBRASKA.

Submitted: May 19, 1978

Filed: June 29, 1978

Before VAN OOSTERHOUT, Senior Circuit Judge, LAY and HENLEY, Circuit Judges.

VAN OOSTERHOUT, Senior Circuit Judge.

Charles Wentz and V.I.P. Electric, Inc.,[1] seek to recover

1. V.I.P. Electric, Inc., Wentz's employer, is made a party plaintiff because it seeks by subrogation to recover payments made to Wentz under the Nebraska workmen's compensation law. Since we find summary judgment was properly granted dismissing

damages against International Brotherhood of Electrical Workers, hereinafter called International, and International Brotherhood of Electrical Workers Local No. 1525, hereinafter called Local 1525, for serious injuries allegedly caused union member Wentz by the union's failure to enforce reasonably safe working conditions. It is alleged that defendants, over plaintiff's protest, permitted V.I.P. Electric to use defective equipment which caused plaintiff to fall against a live wire.

International filed a motion to dismiss plaintiffs' amended complaint on the ground that it did not state a cause of action against it, or alternatively for summary judgment upon the basis that there was no genuine issue of material fact to support plaintiffs' claim against International. International's basic claim is that it cannot be held liable for acts of Local 1525 which it has not authorized or ratified.

On October 19, 1976, the trial court (Judge Urbom) entered an order to the effect that the motion would be treated as one for summary judgment. The parties were given twelve days to present affidavits, documents and requests for oral testimony.

International's motion was submitted on depositions, affidavits and briefs. The court granted International's motion for summary judgment and dismissed the complaint against International. Pursuant to Rule 54(b), Fed. R. Civ. P., the court found that there was no just reason for delay and directed entry of final judgment in favor of International.[2]

Wentz has taken a timely appeal from the final judgment entered against him in favor of International. This court has jurisdiction under 28 U.S.C. § 1291. V.I.P. Electric has not appealed.

The basic issue presented by this appeal is whether the record conclusively establishes as a matter of law that plaintiffs have no cause of action against International.

---

the claim against International, V.I.P. Electric, Inc., has acquired no rights against the International and its claim will not be further discussed in this opinion.

2. Local 1525 also moved to dismiss the complaint. Such motion was denied. The validity of such ruling is not before us on appeal.

Judge Urbom in an unreported memorandum opinion states:

> It is clear that the plaintiffs do not claim that any representative of the International actually did anything or was required to do anything with respect to the conditions under which the plaintiff Wentz worked. The International apparently did play some role in determining certain safety provisions of the collective bargaining agreement, but this has no connection with the discriminatory or bad faith conduct which allegedly caused the plaintiff Wentz' injuries. The plaintiffs' theory is that the International exercises such control over the Local that the acts of the Local are attributable to the International. While the power of the International over the affairs of the Local is considerable, it is no more pervasive than typically has been involved in cases in which it has been held that locals and national or international unions are separate entities. See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922), *Gray v. International Assoc. of Heat Insulators, Local 51*, 416 F.2d 313 (C.A. 6th Cir. 1969); *DiGiorgio Fruit Corp. v. NLRB*, 191 F.2d 642 (C.A.D.C. Cir. 1951).

In our recent case of *Highway & City Freight Drivers, Dockmen and Helpers, Local Union No. 600, v. Gordon Transports, Inc.*, — F.2d — (8th Cir. May 19, 1978) (No. 77-1542), we held that a local union has adequately autonomous existence to allow it to file a voluntary petition in bankruptcy. In support thereof we noted that *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344, 392 (1922), recognized that unions "are, as has been abundantly shown, associations existing under the laws of the United States, of the Territories thereof, and of the States of the Union." Slip op. at 4. This court further held: "In *Coronado Coal* the Supreme Court held that unincorporated labor unions such as the United Mine Workers were distinct entities suable in federal court." Slip op. at 5. Support for such position is also pointed out in *United States v. White*, 322 U.S. 694 (1944). Local 1525 and International are separate and distinct entities.

The collective bargaining contract which contains the union's obligation to protect the safety of its employees was entered into by Local 1525 and V.I.P. Electric. The International is not a party to such contract.

Complaints raising the lack of safety features of V.I.P. Electric's equipment were made to local officials only. As found by the trial court, there is no support for any claim that safety complaints were made to the International. No International representative participated in the incident leading to the unfortunate accident.

Under the undisputed facts shown by the record, Local 1525 as the exclusive bargaining agent for its employees is the party responsible for enforcing the safety provisions of its contract with the employer.

In *Kuhn v. National Association of Letter Carriers*, 528 F.2d 767, 770 (8th Cir. 1976), this court held:

> [T]he record shows conclusively that the National Association was under no duty, either statutory or contractual, to Kuhn. It played no part whatsoever in advising or consulting with Kuhn with respect to the grievance and was in no way responsible for the failure, if any, of Branch 5 to properly present Kuhn's case at the informal appearance before the postal authorities or in failing to file a notice of appeal within the appropriate time limits.

Under ordinary rules of agency, International is not liable for acts of Local 1525 which it has not authorized or ratified. In our present case the record establishes without dispute that Wentz never made safety complaints to any International official or representative, nor did any International official or agent participate in the negotiations or enforcement of the collective bargaining agreement.

The judgment dismissing the complaint against International is affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U.S.
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RESPONDENTS.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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In The

United States District Court

for the District of Nebraska

CHARLES WENTZ and V.I.P. ELECTRIC, INC., a corporation, PLAINTIFFS,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
DEFENDANTS

MEMORANDUM ON MOTIONS TO DISMISS AND FOR SUMMARY JUDGMENT

CV76-L-60

In this case the plaintiffs, Charles Wentz and V.I.P. Electric, Inc., seek to recover damages from the defendant labor unions for injuries to Wentz allegedly caused by the unions' failure to negotiate and enforce reasonably safe working conditions. The two defendants are International Brotherhood of Electrical Workers (the International) and International Brotherhood of Electrical Workers, Local No. 1525 (the Local). In one paragraph of the amended complaint, filing 21, the plaintiffs allege that the unions' acts and omissions were arbitrary, discriminatory, or in bad faith; in another paragraph it is alleged that the unions' conduct was wilful. Both defendants have filed motions to dismiss the complaint on the ground that it fails to state a claim or in the alternative for summary judgment. In addition, the International has filed a motion to dismiss, which has

been treated as a motion for summary judgment, on the ground that it cannot be held liable for the acts of the Local. A hearing has been held and the motions have been submitted on depositions, affidavits and briefs.

In an earlier memorandum in which I granted a motion to dismiss for failure to state a claim under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185, but in which I also allowed the plaintiffs to amend the complaint to allege a claim under § 9(a) of the National Labor Relations Act, 29 U.S.C. § 159(a), I stated:

> "Language in the complaint suggests, however, that this may also be viewed as a suit seeking damages for the union's breach of its duty of fair representation. *Bryant*, supra. The court in *Beriault v Local 40, Super Cargoes & Checkers of I.L. & W.U.*, 501 F.2d 258, 263 (C.A. 9th Cir. 1974), sets the legal background for the duty:
>
> > 'In Steele v Louisville & N. R.R., 323 U.S. 192, 65 S. Ct. 226, 89 L. Ed. 173 (1944), a case involving the Railway Labor Act, the Supreme Court first announced that a union has the statutory duty to represent fairly all of the members of the employee bargaining unit. Later, in Ford Motor Co. v Huffman, 345 U.S. 330, 73 S. Ct. 681, 97 L. Ed. 1048 (1953), the Court applied the doctrine to a case under the NLRA. This duty is implied from the grant to the union by § 9(a) of the NLRA, 29 U.S.C. § 159(a), of exclusive power to represent all employees in the unit. Vaca v Sipes, *supra*, 386 U.S. at 177, 87 S. Ct. 903. Section 1337, 28 U.S.C. § 1337, confers jurisdiction on federal courts over suits for breach of this duty. Retana v Apartment Workers, Local 14, 453 F.2d 1018, 1022 (9th Cir. 1972); Waters v Wisconsin Steel Works, 427 F.2d 476, 490 (7th Cir. 1970), cert. denied, United Order of Am. Bricklayers and Stone Masons Local 21 v Waters, 400 U.S. 911, 91 S. Ct. 137, 27 L. Ed. 2d 151 (1970).' "

As noted, the amended complaint does allege wilful, arbitrary, discriminatory and bad faith conduct on the part of the unions in failing to negotiate and enforce reasonably safe working conditions for the plaintiff Wentz. I stand by my previous

determination that such allegations do state a claim. The defendants note that the plaintiff is unable to cite any case in which a breach of a union's duty of fair representation served as a basis for liability for personal injury of a union member allegedly caused by unsafe working conditions. They also argue that cases holding that the negligence of a union cannot be the basis of liability for such injuries to a member are applicable. It is clear, however, that the plaintiffs' claim does not rest on allegations of negligence, but on the alleged discriminatory and bad faith conduct of the unions. The language of the cases cited in the excerpt from my previous memorandum is broad enough to include the present complaint, and the defendants have not persuaded me that any policy considerations require special treatment of claims involving personal injuries.

The defendants also argue that even if a claim is stated, the depositions and affidavits on file establish that there was no discriminatory or bad faith conduct by the unions.

I conclude that there remain genuine issues of material facts. One such issue is whether the unions' enforcement of safety provisions arbitrarily discriminated between employees based on the identity of the employer for whom he worked. Therefore, summary judgment is inappropriate. Rule 56 of the Federal Rules of Civil Procedure.

The motion of the International for summary judgment stands on different ground. It is clear that the plaintiffs do not claim that any representative of the International actually did anything or was required to do anything with respect to the conditions under which the plaintiff Wentz worked. The International apparently did play some role in determining certain safety provisions of the collective bargaining agreement, but this has no connection with the discriminatory or bad faith conduct which allegedly caused the plaintiff Wentz' injuries. The plaintiffs' theory is that the International exercises such control over the Local that the acts of the Local are attributable to the International. While the power of the International over the affairs of the Local is considerable, it is no more pervasive than typically has been involved in cases in which it has been held that locals and national or international unions are separate en-

tities. See *United Mine Workers v Coronado Coal Co.*, 259 U.S. 344 (1922); *Gray v International Assoc. of Heat Insulators, Local 51*, 416 F.2d 313 (C.A. 6th Cir. 1969); *DiGiorgio Fruit Corp. v NLRB*, 191 F.2d 642 (C.A. D.C. Cir. 1951). The International's showing in support of its motion, which includes the International's constitution and the applicable collective bargain agreement, establishes that the Local is a separate, albeit dependent, entity, and not an agent of the International. The plaintiff has been unable to offer any showing which creates a factual controversy on this issue; consequently, summary judgment is proper. See *Percival v General Motors Corp.*, 539 F.2d 1126 (C.A. 8th Cir. 1976).

Entry of an order or judgment will be withheld pending statements from counsel regarding utilization of 28 U.S.C. § 1292(b) and Rule 54(b).

Dated October 19, 1977.

BY THE COURT

WARREN K. URBOM
Chief Judge

In The

United States District Court

for the District of Nebraska

CHARLES WENTZ and V.I.P. ELECTRIC, INC., a corporation, PLAINTIFFS,

vs.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS and INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
DEFENDANTS.

ORDER

CV76-L-60

In accordance with my memorandum of October 19, 1977, filing 49, and following communication with counsel regarding the benefits of immediate appeals,

IT HEREBY IS ORDERED AND ADJUDGED:

1. That the defendants' motion to dismiss, filing 39, is denied; that in accordance with 28 U.S.C. § 1292(b) I hereby state that I am of the opinion that this order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal may materially advance the ultimate termination of the litigation; and

2. That the defendant International Brotherhood of Electrical Workers' motion to dismiss, filing 7, which has been treated as a motion for summary judgment, is granted; that pursuant to Rule 54(b) of the Federal Rules of Civil Procedure I hereby determine that there is no just reason for delay and accordingly

I direct that final judgment in favor of the defendant International Brotherhood of Electric Workers and against the plaintiffs is hereby entered.

Dated December 7, 1977.

BY THE COURT

WARREN K. URBOM
Chief Judge

CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of October, 1978, three copies of the Supplemental Appendix to Petition for Writ of Certiorari were mailed, postage prepaid, to David D. Weinberg, Weinberg & Weinberg, P.C., 300 Keeline Building, Omaha, Nebraska, 68102, Counsel for the Respondent. I further certify that all parties required to be served have been served.

Kenneth Cobb

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P.O. Box 2309
Lincoln, NE 63501
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OCT 25 1978
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-522

CHARLES WENTZ AND V.I.P. ELECTRIC, INC.,
Petitioners,

v.

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL NO. 1525,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF IN OPPOSITION FOR INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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The Respondent, International Brotherhood of Electical Workers, respectfully requests that this Court deny the petition for a writ of certiorari, seeking review of the Eighth Circuit's judgment in this case.[1] The Eighth Circuit's opinion is printed in an Appendix to the Petition ("App."). The District Court's opinion is printed in a separate Supplemental Appendix to the Petition ("Supp. App.").

QUESTION PRESENTED

Whether an employee injured at the jobsite can re-

[1] While Local No. 1525 is designated as a respondent pursuant to Rule 21(4), no issue involving Local 1525 was before the Court of Appeals.

cover damages from an international union, under Section 9(a) of the National Labor Relations Act (29 U.S.C. §159(a)), where the international union is not his collective bargaining representative; neither authorized, ratified nor even knew of the job conditions which allegedly caused the injury; and otherwise had no connection with the incident.

STATEMENT OF THE CASE

This case involves a claim for damages by Mr. Charles Wentz—an employee of V.I.P. Electric ("V.I.P.") and a member of Local Union No. 1525, IBEW, Omaha, Nebraska—for injuries resulting to him from falling against a live wire on the jobsite. Wentz sued his Local Union and its International Union in the United States District Court for the District of Nebraska alleging that the Unions permitted V.I.P. to use defective equipment which caused Wentz' fall.

The District Court granted a motion for summary judgment in favor of the International following a hearing, and on the basis of depositions, affidavits and briefs. A motion for summary judgment by the Local Union was denied, however, on the ground that an issue of fact existed as to whether the Local's enforcement of the safety provisions in its contract with V.I.P. arbitrarily discriminated between employees based on the identity of the employer for whom they worked (App. 3). Plaintiff's claim against the Local remains to be tried and is not before this Court. The Court of Appeals affirmed the judgment in favor of the International, holding that the record conclusively established as a matter of law that plaintiff has no cause of action against the International (App. 12).

The lower courts relied upon the facts of record showing that the International Union is not the collective bargaining representative of Mr. Wentz nor of any employees of V.I.P. (R. 14, 15, 186, 207-08). Nor is the International Union a party to the collective bargaining agreement between Local 1525 and V.I.P. (App. 10; Supp. App. 14). While the International has encouraged all of its Local Unions to promote the health and safety interests of electrical workers through the collective bargaining process, and has approved Local 1525's agreement [2] containing a safety provision [3], the International "has no connection with the discriminatory or bad faith conduct which allegedly caused the plaintiff Wentz' injuries." (Supp. App. 3.)

"It is clear that the plaintiffs do not claim that any representative of the International actually did anything or was required to do anything with respect to the conditions under which the plaintiff Wentz worked." (Supp. App. 3.) Nor was there any dispute that the International neither authorized, ratified,

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[2] The International's approval of Local 1525's agreement was made in accordance with the general approval procedure contained in the International Constitution (R. 33).

[3] That provision states:

"Article V, Hours—Wage Payments—Apprentices—Working Conditions

"Sec. 13A. The employer shall furnish rubber gloves, protectors, shields, blankets, hard hats and other protective equipment in accordance with safe operating procedure and requirements of any safety laws. Rubber goods must be given a proper test at least once each month. Employees must sign a deduction slip to cover the cost of hard hat issued to him at the start of employment. If hat is not returned, costs will be deducted from his final pay check." (R. 34.)

nor even knew of, any act of Local 1525 which forms the basis of plaintiff's claim against the Local. Wentz never made any safety complaint to any International official or representative, nor did any International official or representative participate in the negotiations or enforcement of the collective bargaining agreement (App. 14).

On the basis of the record, the District Court found that "while the power of the International over the affairs of the Local is considerable, it is no more pervasive than typically has been involved in cases in which it has been held that locals and national or international unions are separate entities. See *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922); *Gray v. International Assoc. of Heat Insulators, Local 51*, 416 F. 2d 313 (C.A. 6th Cir. 1969); *DiGiorgio Fruit Corp. v. NLRB*, 191 F. 2d 642 (C.A. D.C. Cir. 1951)." (Supp. App. 3-4.)

> "The International's showing in support of its motion, which includes the International's constitution and the applicable collective bargain[sic] agreement, establishes that the Local is a separate, albeit dependent, entity, and not an agent of the International. The plaintiff has been unable to offer any showing which creates a factual controversy on this issue; consequently, summary judgment is proper. See *Percival v. General Motors Corp.*, 539 F. 2d 1126 (C.A. 8th Cir. 1976)." (Supp. App. 4.)

Thus, for example, Local Union No. 1525 elects its own officers by secret ballot, including a Local Union President, Business Manager and Financial Secretary. The Local Union President appoints committees and delegates; and the Business Manager appoints stewards

who work under his direction and are subject to his authority. The Financial Secretary and President and Business Manager are paid by Local Union No. 1525 and receive no income or other monies from the International.

The Business Manager of Local Union No. 1525 conducts the day-to-day affairs of the Local Union. His duties include the enforcement of the provisions of the collective bargaining agreement that the Local has with employers and the adjustment of grievances with employers. Local Union No. 1525 has complete control of the negotiation and administration of its collective bargaining agreement. The Negotiating Committee is appointed by the President.

Local Union No. 1525 has been recognized by V.I.P. Electric, Inc. as the exclusive collective bargaining representative for the employees in its operations. The International is not and has not been a party to, or a signatory of, these agreements. Local No. 1525 has, and has had, complete control of the administration of these agreements, including the grievance-arbitration procedures contained therein.

Local Union No. 1525 maintains its own accounts, property and other assets in Douglas County, Nebraska. The Financial Secretary of the Local Union keeps the books and records in connection with the receipts and expenditures of the Local Union. Local Union No. 1525 has complete control over its business affairs.

The Local Union admits to membership qualified journeymen and apprentices. The International does not participate in any manner in the admission of ap-

plicants to membership in the Local Union. The Local Union sets its own rate of dues. (R. 15-16, 12-14.)

REASONS FOR DENYING THE WRIT

A. None of the Reasons Supporting Review Set Forth in Rule 19 is Present.

The petition fails to demonstrate, or even to argue, that any of the reasons in support of review set forth in Rule 19 are present. The Court of Appeals relied upon a consistent line of authority, in this Court, in its own Circuit, and other Circuits (App. 13), and applied the "ordinary rules of agency" to the relationship between the International and Local 1525 (App. 14), to hold that the record conclusively establishes as a matter of law that plaintiffs have no cause of action against the International (App. 12).

There is no conflict between the Court of Appeals' decision and the decision of another court of appeals: there is no question of federal law which has not been settled by this Court; and there is no conflict with applicable decisions of this Court. See Rule 19(b), Rules of Supreme Court.

B. The Decisions of the Courts Below—That Under the Facts of Record, There is Absolutely No Basis for a Finding of an Agency Relationship Between the International and Local 1525—Do Not Warrant Review By This Court.

Petitioner would have this Court grant review to consider and reverse the decisions of both lower courts that no evidentiary basis exists for a finding of agency.

Those courts had before them the IBEW Constitution; the collective bargaining agreement between Local 1525 and V.I.P.; the communications issued by the International to its Locals on the subject of safety; and evidence specifically showing the nature of the

relationship between the International and Local 1525. On the basis of that full record showing absolutely no connection between the International and the working conditions at the V.I.P. jobsite allegedly giving rise to Petitioner's injury, the courts found no agency relationship. (App. 14.) Certiorari is not warranted to review the factual record a third time.

While the petition selectively asserts "facts" relating to the powers of the International Union, it does not pretend to argue that the findings below are clearly erroneous, or even erroneous. Moreover, the petition misstates many of the "facts" it asserts. Thus, for example, it is grossly inaccurate for it to state that "the International must approve everything the Local does" (Pet. 8). The Local is autonomous in many respects, including the negotiation and administration of its own contracts. (Supp. App. 3-4; R. 12-16.) The International does *not* "approve" Local Union "officers", who are elected by the Local's members (Pet. 5). (R. 13, 15.) And, as regards safety matters specifically, the International does *not* "set up the standards of safety which the Local Union shall follow", "make investigations of accidents", or engage in "a highly comprehensive safety provision review and enforcement procedure and maintain close control over the Local" (Pet. 5, 7). It *encourages* locals to promote safety on the job and *recommends* safety standards for adoption. (Supp. App. 3; R. 27, 31, 35-37.)

The District Court found, generally, that the power of the International "is no more pervasive than typically has been involved in cases in which it has been held that locals and national or international unions are separate entities." (Supp. App. 3-4.) This is clearly correct. This Court's leading decision in *United Mine Workers v. Coronado Coal Co.*, 259 U.S. 344 (1922),

finding no agency relationship [4], involved a Union which the National Labor Relations Board—an agency cognizant of the operations of labor organizations—has stated "regulates the affairs of its locals more closely" than any international union. Of relevance, that statement concerning the United Mine Workers was made in a case involving Respondent here, the Board holding after a careful review of the Constitution of the IBEW and its relationship to its Locals, that the Locals are not agents of the International. *International Brotherhood of Electrical Workers (Franklin Electric Construction Co.)*, 121 NLRB 143 (1958).

C. There is No Basis in Law or Policy for Departing From the Firmly Established Rule in Federal Labor Relations That an International Union Such As the IBEW Is Not Liable for Acts of a Local Absent Participation or Ratification.

At one point in the petition (pp. 6-7), Wentz suggests that *United Mine Workers v. Coronado,* 259 U.S. 344 (1922) (and the long line of authority emanating therefrom) be overruled. This is a suggestion that the liability of international unions such as Respondent for acts of their local unions should no longer be based on the ordinary rules of agency, but that instead, international unions should be made vicariously liable for the unlawful acts (or omissions) of the multitude of officers, representatives, stewards and employees of the hundreds of affiliated local unions, however far removed such acts may be from the International's functions, policies, presence or knowledge.

[4] Petitioner's effort to distinguish *Coronado* (Pet. 8) is unavailing. In *Coronado,* this Court found no agency relationship, by ratification, notwithstanding remarks made by the international president which appeared to condone an unlawful work stoppage by the local union. 259 U.S. at 393-94. In the instant case, the lower courts found there was no participation by the International in the incident leading to the accident, no connection with the conduct which allegedly caused Wentz' injuries, and not even participation in the negotiation or enforcement of the Local's collective bargaining agreement.

Such a departure from the firmly established rule governing this issue finds no support in either law or policy. As the Court stated in *Coronado:*

> "A corporation is responsible for the wrongs committed by its agents in the course of its business, and this principle is enforced against the contention that torts are ultra vires the corporation. But it must be shown that it is in the business of the corporation. Surely no stricter rule can be enforced against an unincorporated organization like this. Here it is not a question of contract or of holding out an appearance of authority on which some third person acts. It is a mere question of actual agency, which the constitutions of the two bodies settle conclusively. If the International body had interfered, or if it had assumed the liability by ratification, different questions would have arisen." 259 U.S. at 395.

There is no more legal basis for a vicarious standard of international union liability today than when *Coronado* was decided. Indeed, enactment of the Labor-Management Reporting and Disclosure Act of 1959 (29 U.S.C. § 401, *et. seq.*), demonstrates congressional desire to maintain the legal distinction between international and local unions and its intent to preserve for local union members freedom from the kind of domination and control by their internationals to which the petition alludes.

Since *Coronado*, the federal courts and the National Labor Relations Board have applied the ordinary rule of agency in cases brought against labor organizations under various federal labor statutes. *United Construction Workers v. Haislip Baking Co.,* 223 F.2d 872 (4th Cir. 1955); *DiGiorgio Fruit Corporation v. NLRB,*

191 F.2d 642 (D.C. Cir. 1951), *cert. den.* 342 U.S. 869; *Morgan Drive-Away, Inc. v. International Brotherhood of Teamsters,* 268 F.2d 871 (7th Cir. 1959), *cert. den.* 361 U.S. 896; *Hansen v. Hutcheson,* 217 F.2d 171 (7th Cir. 1954); *Gray v. International Association, Etc., et al.,* 416 F.2d 313 (6th Cir. 1969); *NLRB v. Local 1016, Carpenters,* 273 F.2d 686 (2nd Cir. 1960); *Bailey v. Transportation-Communication Employees Union,* 69 LRRM 2723 (N.D. Miss. 1968); *Dominguez v. National Air Lines,* 63 LRRM 2459 (S.D. N.Y. 1966); *Farnsworth & Chambers Co. v. Sheet Metal Workers International Association Local* 49, 125 F. Supp. 830, 834 (D. N.M. 1954); *Axel Newman Heating & Plumbing Co. v. Sheet Metal Workers Local 76,* 37 LRRM 2038 (D. Minn. 1955); *International Brotherhood of Electrical Workers (Franklin Electric Construction Co.),* 121 NLRB 143 (1958); *Local P-575, Amalgamated Meat Cutters (Iowa Beef Packers, Inc.),* 188 NLRB 5 (1971).

Finally, it is submitted that important policy considerations underlie the necessity for preserving the present law of agency as it relates to international-local union relationships. In *United Mine Workers v. Gibbs,* 383 U.S. 715, 738-39, the Court set forth the proposition that national labor policy—whether in a Norris LaGuardia or NLRA context—encourages international unions to conduct normal union functions even in explosive situations. In order that parent organizations would not be "chilled" in exercising their restraining and mediating influences, the Court recognized that "it would be inconsistent with the fabric of national labor policy to infer ratification" of a local union's activities from the strike-mediating efforts of its international or "from the fact that it carried on some normal union functions such as provision of strike relief". The Court

further recognized that this beneficial and salutary international presence would be unlikely if the parent union, in order to avoid liability, were required to repudiate or disavow the acts of its local.

Petitioner argues here that the International should be liable merely because, in the exercise of its normal union functions, it has become involved in a general way in attempting to promote the safety of electrical workers at jobsites. The record below shows that the International has communicated with its Local Unions recommending the inclusion of safety provisions in collective bargaining agreements and otherwise encouraging the advancement of jobsite safety through the collective bargaining process. If Petitioner were to have his way, and the International were to be held liable for an injury resulting from allegedly unsafe conditions at a particular jobsite over which the International had neither control nor knowledge, one of two things could result. Either, international unions would withdraw completely from attempting to exercise a salutary influence in support of the national policy promoting the health and safety of employees, or international unions would be required substantially to increase their staffs so as to police jobsites on a day-to-day basis, notwithstanding the presence of local union stewards and other representatives who are the exclusive collective bargaining representatives under the NLRA. Clearly, neither result is desirable.

From the record below it is obvious that Petitioner included in his suit the International Union—with whose representatives he had never even spoken (App. 14; R. 82-83)—solely to obtain a windfall from an entity he assumed to be more capable of satisfying a

judgment.[5] His effort to have this Court review the uniform evidentiary findings of the courts below and/or to overrule firmly established principles rooted in law and policy should be rejected.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[5] Contrary to the statement in the petition, however, there is no evidence to show that Local 1525 is insolvent or otherwise unable to satisfy a judgment.